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Arizona's new religious freedom law: License to discriminate against gays?

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Arizona's new religious freedom law—
not an "anti-gay" law, but still not a very good idea

The Internet is filled with outrage at a Bill which has now passed both houses of the Arizona legislature and is described variously as a “right to discriminate” law, and an “anti-gay” law. People are naturally outraged that Arizona could enact something that gives a “license to discriminate”.

As usual, the bill is not quite as bad as made out in some of the more vitriolic attacks. However, on balance I don’t think it is a very good idea, and indeed the passing of the legislation may in fact so polarise future debate that it may be impossible to enact more carefully targeted laws achieving the result that legislators want to achieve. In this note I will aim to outline the background to the Bill, why it has been passed, and the problems it will raise.

Those who have tried to read the Bill without much background in US law may initially be struck by how far its language is from those who have attacked it on the Internet. For a supposed “anti-gay” law, it does not once mention homosexuality or sexual orientation at all. But its opponents are correct to say that it will have an impact on anti-discrimination actions brought on the ground of sexual orientation. Let me try to explain.

The Bill cannot really be understood without some knowledge of how religious freedom is protected in the US. There is a “Fact Sheet” explaining the operation of the Bill produced by the Arizona legislature, which does a good job of summarising the situation. (I have added numbering to assist in navigation.)

1. The First Amendment to the United States Constitution provides in relevant part that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. The latter portion of the provision is known as the Free Exercise Clause.

2. In 1990, Congress passed the Religious Freedom Restoration Act (RFRA), which instructed courts to apply strict scrutiny when government substantially burdens a person’s exercise of religion, even if the burden results from a law of general applicability.

3. However, the United States Supreme Court has since held that the federal RFRA may not be extended to the states and local governments (City of Boerne v. Flores, 521 U.S. 507 (1997)). In response to City of Boerne v. Flores, Arizona enacted state-level protection from the government substantially burdening the free exercise of religion using the strict scrutiny compelling interest test (Laws 1999, Chapter 332).

4. Accordingly, government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person is both in furtherance of a compelling governmental interest and the least restrictive means of furthering that compelling governmental interest (A.R.S. § 35A-211).

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3 Arizona Senate Bill 1062 was the final version sent to the Governor, who has not yet approved it. See [http://www.azleg.gov/legtext/51leg/2r/bills/sb1062p.htm](http://www.azleg.gov/legtext/51leg/2r/bills/sb1062p.htm) for the full text of the Bill.

4 NF: It is worth noting that this followed a significant decision of the US Supreme Court in Employment Division v Smith 494 US 872 (1990), which effectively held any law which is “neutral and generally applicable” will be able to restrict freedom of religion. The Congress, and then a number of US States, passed the RFRA and related laws to restore what had previously been thought to be the appropriate interpretation of the Free Exercise clause.

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The Arizona version of RFRA, then, is the statute being amended by the controversial new Bill. It is designed to protect freedom of religion, and is not as such concerned with homosexuality or indeed discrimination. But of course insofar as religious freedom and discrimination rights may intersect, there will be an impact.

There are two important changes that the Bill proposes. One is that previously it was clear that the law only protected the religious freedom of **individuals or religious organisations (such as churches)**. The amendment broadens the scope of protection to apply to all actors, including companies and businesses. Section 41-1493(5), which defines “person”, will now include “any individual, association, partnership, corporation, church, religious assembly or institution, estate, trust, foundation or other legal entity”.

Secondly, the class of persons **bound by the Act** is expanded. Previously it was only direct action by “government” that was limited. The amending Bill expands s 41-1493.01 to cover “State action”, and that term is now defined to mean “any action by the government or the implementation or application of any law, including state and local laws, ordinances, rules, regulations and policies, whether statutory or otherwise, and whether the implementation or application is made or attempted to be made by the government or nongovernmental persons.”

Why have these changes been made? And why do they amount, on some views, to a “license to discriminate” against gays?

The factual background to the changes is the growing tension in the US over recognition of same sex marriages. A minority of States have actually changed their laws to allow marriage between same sex partners; another group of States have actually passed constitutional amendments or other laws clarifying that their law will not recognise these partnerships as marriage. Two recent decisions of the US Supreme Court, United States v Windsor, 570 US __, 2013 WL 3196928, No 12-307 (26 June 2013) and Hollingsworth v Perry, 570 US __, 2013 WL 3196927, No 12-144 (26 June 2013), while not ruling that same sex marriage is a constitutionally protected right, are seen as moving in that direction.

But of course many Christians who base their views of morality on Biblical teaching regard homosexual relations as contrary to God’s will. One case in particular has brought the tension here to a head. In Elane Photography, LLC v. Willock, 2013-NMSC-040, 309 P.3d 53 (22 August 2013) the New Mexico Supreme Court upheld a fine imposed on a wedding photographer who had declined to photograph a same sex commitment ceremony on the basis of her strongly held religious belief that the relationship was contrary to God’s word, and that her involvement as a photographer involved her contributing to the celebration and affirmation of the relationship. (The decision has now been appealed to the US Supreme Court.)

This, then, is the sort of case that the Arizona legislators are trying to deal with. The amendments would mean that an Arizona photographer who wished

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to decline to celebrate a same sex ceremony would be able to do so lawfully under the amended Arizona Religious Freedom law. Under s 41-1493(2) the definition of “exercise of religion” is “the practice or observance of religion, including the ability to act or refusal to act in a manner substantially motivated by a religious belief, whether or not the exercise is compulsory or central to a larger system of religious belief”. Photographers would be able to argue that their refusal to celebrate a same sex ceremony was “substantially motivated by a religious belief”. (The concluding words about it not mattering whether such a belief is “compulsory or central” are designed to remove from a court the difficult and probably impossible task of judging which religious obligations are more important than others.)

While there may be an Arizona law making it unlawful to discriminate on the basis of sexual orientation, a person suing under such a law would be taking “state action” as defined above, because this would be “the implementation or application of any law.” Under s 41-1493.01(B), the photographer would be able to argue that this action would “substantially burden [their] exercise of religion”, “even if [it could be argued that] the burden results from a rule of general applicability.” The person taking a discrimination action would then need to justify their action under s 41-1493.01(C), by showing that

that application of the burden to the person’s exercise of religion in this particular instance is both:
1. In furtherance of a compelling governmental interest.
2. The least restrictive means of furthering that compelling governmental interest.

Presumably the photographer may concede that prevention of sexual orientation discrimination in general is a compelling interest, but may still argue that there were other photographers available to perform the service in question, and hence that obliging a Christian photographer to compromise their consciences was not the “least restrictive” means of furthering that interest.

The above application of the law, to me at any rate, sounds reasonable. However, the law as framed goes beyond that limited example, and unacceptably so.

Let me pause, however, to introduce some reality to the debate. The law does not, as suggested by some of the internet hysteria, give carte blanch to anyone at all to discriminate against others on any ground. For it to provide protection, the person who is seeking to apply the amended Act must demonstrate that they are confronted with a dilemma raised by actual “religious belief”, and that to behave in a certain manner otherwise required by the law would be a “substantial burden” on that religious belief.

Some may respond that these are purely subjective issues, easily established on the mere assertion of the defendant. But that is not so. A claim to have a religious belief would need to be supported by evidence as to the source of the belief, that it was a serious and coherent belief actually held by the person, and not simply one “made up” for the purposes of litigation. Evidence would presumably include evidence of what the person usually says and does and whether their behaviour prior to the relevant incident revealed a genuine commitment to a religion.

In addition, the concept of “substantial burden” would weigh heavily with a court. To take an example given by some, it seems very hard to imagine a
genuine situation in which someone serving food in a restaurant, for example, would be able to justify a genuine religious belief that would be seriously burdened by serving a gay person (or a black person, or a woman, or a disabled person.) On the other hand, given the widespread and longstanding views about appropriate sexual morality among many mainstream religions, it would arguable be a “serious burden” to require someone to not simply serve a gay customer, but to actually be actively involved in celebrating and supporting a personal relationship, the essence of which was contrary to orthodox religious morality.

Still, there is clearly going to be room for debate about these issues: existence of a religious belief, the severity of a burden. In addition, while the presenting problem justifying the amendments was seen to be the “religious freedom in response to same sex ceremony” cases (like Elane), the resulting law goes much further. It introduces a religious freedom defence applying to all laws of Arizona, including presumably discrimination laws preventing discrimination on the basis of race, gender, disability and other grounds. It seems much harder to justify possible religious defences based on those grounds (partly because traditional Christianity, at least, was never read by the majority of its exponents to permit differentiation on those grounds in day to day life.) It extends that defence from its previous application to individuals and religious groups, to a range of commercial entities.

On balance there are serious reasons to be concerned about the breadth of Arizona’s law. It would be preferable instead to deal with the specific problems generated by same sex marriage by specific laws crafted for that issue. One reason is that it is here, for the first time, that we see a clear conflict between traditional Christian morality and the new “orthodoxy” of modern Western society. While there were fringe groups that supported racial discrimination based on the Bible, those groups never represented mainstream Christianity. But for the last 2000 years or so Christianity around the world has condemned homosexual intercourse as not in accordance with God’s word. It is only to be expected that compelling Christians to behave in a way that sanctions, and approves, and celebrates, an institution that at its heart rejects a basic principle of the Biblical faith, will cause problems. Drafting a law that is restricted to allowing Christians not to support same sex marriage may be complicated, but it is much preferable to the sort of “sledge-hammer” approach the Arizona Bill seems to take.

Finally, what about the situation in Australia? Here we have, in NSW at least, 2 laws that make it unlawful to discriminate against someone on the grounds of their sexual orientation. From NSW s 49ZP of the Anti-Discrimination Act 1977 (NSW) provides:

49ZP Provision of goods and services
It is unlawful for a person who provides, for payment or not, goods or services to discriminate against another person on the ground of homosexuality:
(a) by refusing to provide the person with those goods or services, or
(b) in the terms on which he or she provides the person with those goods or services.

In the Commonwealth sphere we have the Sex Discrimination Act 1984 s 22, which provides:
22 Goods, services and facilities

(1) It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person’s sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding:

(a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person;

(b) in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or

(c) in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person.

In each case a wedding photographer, for example, would be someone who provides services.

One might argue that it is not the orientation of the persons concerned, but the nature of the relationship, that has led to a decision not to be involved. Could someone who made it clear that they would only photograph “weddings” that would lead to lawful marriages, be able to avoid being found to have discriminated on the grounds of sexual orientation? But this may not be a helpful strategy. On the one hand (I don’t know the market for these things) it would seem to be unlikely that many heterosexual de facto couples would ask for a “commitment ceremony” which was not actually a marriage. As a result, it may be that a policy of only photographing “marriages” as such would end up being “indirect discrimination” against same sex couples (see for example s 5A(2) of the Cth SDA, which refers to a “condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons who have the same sexual orientation as the aggrieved person.”)

On the other hand, having a policy that one will only photograph lawful marriages may end up itself being discriminatory on the grounds of “marital status”, which is a separate ground of unlawful discrimination (see Cth SDA s 6, NSW ADA s 47.)

As a result it is possible that an Australian Christian wedding photographer (or florist, or baker) who refused to provide services to support a same sex commitment ceremony may be in breach of the law. Exemptions that apply on the basis of religion under the relevant Acts currently only apply to religious organisations, not to individual believers (see NSW ADA s 56, Cth SDA s 37). Just as cases raising these issues are becoming more common in the US, it seems clear that such cases may arise in Australia. It would seem to be sensible for policy makers to consider whether religious freedom rights are being adequately protected under current Australian laws.

Again, it should be stressed that I am not arguing for a wide-ranging exemption for individuals and businesses as represented by the Arizona law, which I argue above goes too far. But a more narrowly tailored law would be the best way to allow the balancing of anti-discrimination rights, with the important

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7 Noting, of course, that there is no law allowing same sex “marriage” in Australia at the moment, since the High Court struck down the ACT attempt to “go it alone” on the issue in Commonwealth v Australian Capital Territory [2013] HCA 55 (12 December 2013).

8 And see NSW ADA s 49ZG(1)(b).
right not to be compelled to go against serious conscientious commitments in offering services to the public, especially in a marketplace where equivalent services are readily available from others.

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